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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. [redacted] 51

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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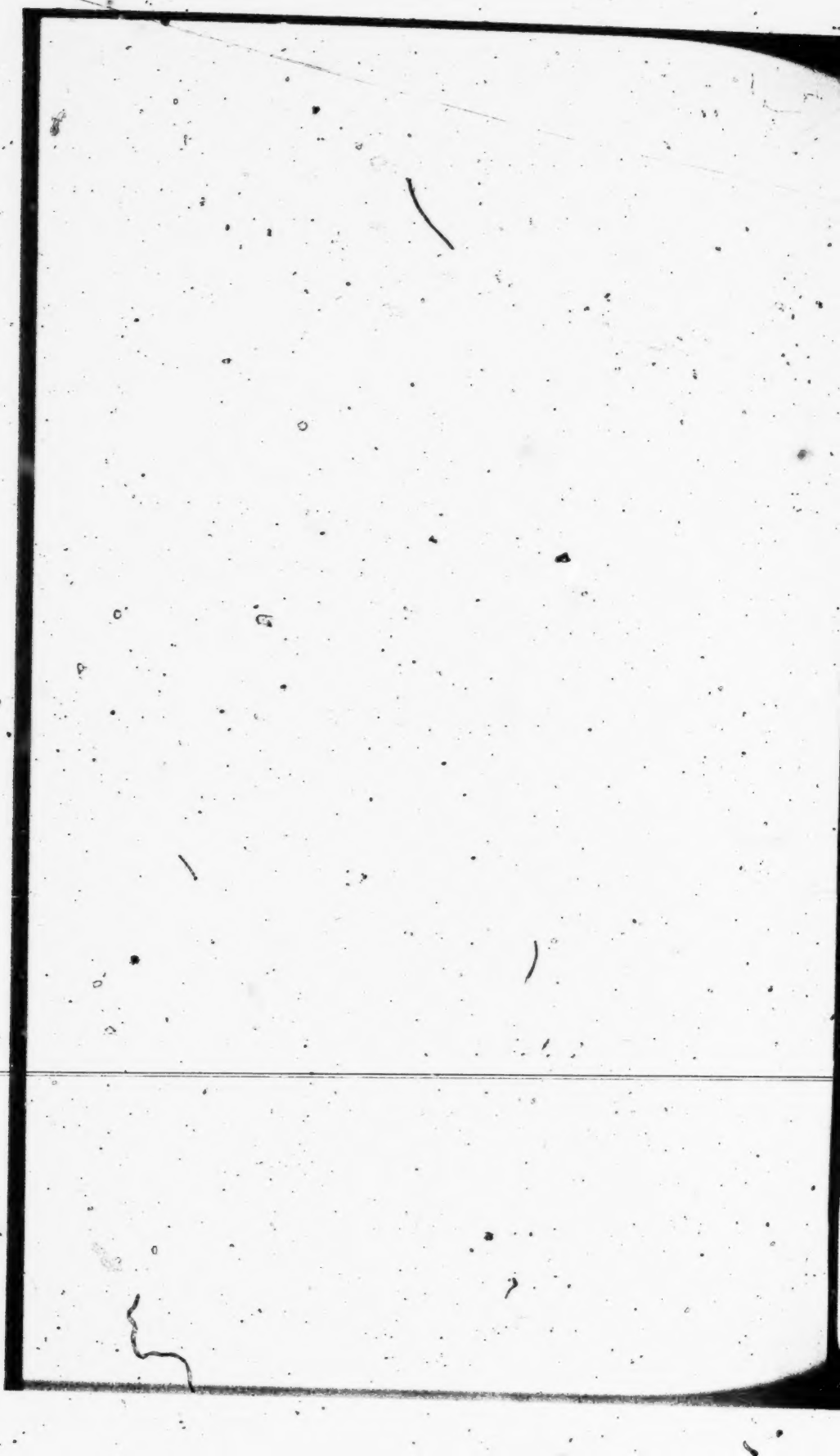


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Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

STATEMENT OF MATTER INVOLVED.

The important question here involved is as to the meaning of the term *"any party in interest,"* as the same is used in Paragraph (20) of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, Paragraph 20) the paragraph providing that any railroad construction, operation or abandonment contrary to its provisions or the provisions of Paragraph (18) of the same section "may be enjoined by any Court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or *any party in interest*" (emphasis ours).

We contend that the opinion of the Circuit Court of Appeals in this matter (R. pp. 316 to 322)* clearly so limits such term as to exclude any party who is not possessed of an independent legal right of his own which will be invaded by the threatened construction, with the result that the statutory provision for the maintenance of an injunction suit by "any party in interest" to prevent railroad construction in violation of said Paragraphs (18) and (20) would be rendered ineffective for any purpose, and the object Congress had in mind in including "any party in interest" among those at whose suit such forbidden construction could be enjoined, would be entirely frustrated.

Further, we contend that the uncontroverted facts clearly show that petitioner (plaintiff below) was at the time of the institution of this action in the Dis-

*NOTE. For convenient reference this opinion is inserted as an appendix to our brief in support of petition, included under this cover.

trict Court and thenceforth to the entry of the final decree, a "party in interest" as to the proposed unlawful construction by respondent (defendant below), under any reasonable construction of the term "any party in interest."

The action here involved was commenced in the District Court of the United States for the Southern Division of the Northern District of California, by your petitioner, as a party in interest under the provisions of said Paragraph (20), to enjoin the construction by respondent, a common carrier in interstate and intrastate commerce, of an extension of its line of railroad in San Mateo County, California, without first having secured from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing such construction, as required by said Paragraphs (18) and (20).

In the District Court issue was joined upon the question whether the proposed construction by defendant, respondent here, would constitute an extension of its line of railroad within the meaning of that term as used in said Paragraph (18), and upon the question whether plaintiff (petitioner here) was a party in interest within the meaning of that term as used in said Paragraph (20), and so entitled to institute this injunction proceeding.

By consent of the parties the cause was referred to William H. Hunt, Esq., as Special Master, "to take the testimony and report his findings of fact and conclusions of law" to the Court (R. 31, 32).

A full hearing was had before the Special Master, who by consent of the parties also personally examined the territory involved (R. 287). His Report, including his findings of fact and conclusions of law in favor of petitioner upon both said issues, was filed in the District Court December 28, 1929 (R. 35-45, incl.). Exceptions to the Report were filed by the defendant (respondent here).

On January 31, 1930, the District Court, Judge Frank H. Kerrigan presiding, confirmed the Report, adopting the Special Master's findings of fact and conclusions of law as those of the Court (R. 58).

On February 28, 1930, final decree was entered perpetually enjoining defendant from constructing as proposed "unless and until there has first been obtained from the Interstate Commerce Commission of the United States its certificate that the present or future public convenience or necessity requires or will require the construction of such extension" (R. 61-75, incl.).

On appeal by defendant from this decree, the Circuit Court of Appeals, on February 9, 1931, reversed the decree of the District Court solely upon the ground that the plaintiff, petitioner here, was not at the commencement of the action or at any time thereafter, up to the entry of the final decree, a "party in interest" within the meaning of that term as used in said Paragraph (20) (Opinion, R. 316 to 322). The Circuit Court of Appeals declined to decide the question "whether the line contemplated by the applicant is a spur or industrial track, wholly within a state and

within the exclusive jurisdiction of the State Commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission" (Opinion, R. 316, 322).

Plaintiff's petition for rehearing was denied by the Circuit Court of Appeals on March 16, 1931 (R. 324).

It can not be questioned that the decision of the Circuit Court of Appeals holds that, *notwithstanding the construction proposed by respondent would constitute* (as found by the Special Master and the Trial Court) *an extension of its line of railroad within the meaning of said Paragraphs (18) and (20)*, your petitioner was without right to maintain an action to enjoin, for the reason that it was not a "party in interest" within the meaning of said Paragraph (20), and such decision must be so interpreted in determining whether the same is erroneous, as is contended by your petitioner.

The facts material to petitioner's claim that it was at the date of the institution of this action and thenceforth to the entry of final decree therein, a "party in interest" within the meaning of that term as used in said paragraph (20), are uncontroverted.

Petitioner, a subsidiary of The Western Pacific Railroad Company, was incorporated July 10, 1928, under the laws of the State of California, for the purpose, among others, of constructing and operating a line of railroad extending from San Francisco, California, southerly to Redwood City in San Mateo County, California, and thence to a connection with

the railroad of The Western Pacific Railroad Company at or near Niles, Alameda County, California (Plff. Ex. 17, R. 277).

On July 16, 1928, it filed with the Interstate Commerce Commission its application for the necessary certificate of public convenience and necessity for the first unit of said proposed line, viz., that portion between San Francisco and Redwood City (R. 85).

Respondent Southern Pacific Company, an interstate common carrier by railroad, the route of whose existing double track main line of railroad between San Francisco and Los Angeles, California (R. 197, 198), was westerly of and nearly parallel with the proposed route of petitioner between South San Francisco and Redwood City, and in the vicinity of and at the point of respondent's own proposed construction approximately 3700 feet westerly from petitioner's route (R. 38), intervened as a "party in interest" in the Interstate Commerce Commission proceeding of petitioner, in opposition to petitioner's application (R. 39).

Hearing on the application was had in San Francisco in January, 1929, and respondent participated therein. An examiner's report recommending denial of the application was thereafter made, but upon application of petitioner the proceeding was reopened over the objection of Southern Pacific Company, respondent here (R. 286), and an amended application to construct the whole line from San Francisco to Niles (in no way affecting the original location of the route of the proposed line in San Mateo County)

was filed. At the date of the institution of petitioner's action and at all times thereafter to the entry of the final decree, petitioner's proceeding before the Commission was pending undetermined (Opinion, Circuit Court of Appeals). To avoid any suggestion that this action may have become moot by reason of unfavorable action of the Commission subsequent to the final injunction decree herein, we assume to state, as is intimated by the opinion of the Circuit Court of Appeals, that petitioner's proceeding before the Commission was finally determined by the granting of petitioner's application, pending decision by the Circuit Court of Appeals.

The territory involved in this proceeding which is proposed to be served by petitioner, being principally the territory lying easterly of its proposed line and bordering on the Bay of San Francisco (R. 38, 39), is in large part available for industrial use and desirable for industrial projects, and, according to the findings, "is new territory, which has not heretofore been served by the defendant railroad" (respondent here) (R. 39).

Very shortly after the San Francisco hearing on petitioner's application to the Commission, viz., on March 23, 1929, respondent, without having presented to the Commission any application for the necessary certificate of public convenience and necessity therefor, and under the circumstances and in the manner stated in Findings 10, 11 and 12 (R. 40, 41), commenced the construction of its proposed extension to cross petitioner's proposed line, and to be approxi-

mately 8200 feet in length, and designed "to serve an unlimited territory extending to the Bay of San Francisco" (Finding 11, R. 40), being the same territory proposed to be served by petitioner.

It was also found by the Special Master that the purpose of respondent was and is to connect its partially constructed track at its westerly end with its existing line, and to extend it at the easterly end, northerly and southerly and approximately parallel with the proposed railroad of petitioner (R. 42).

Admittedly, respondent has never asked for or obtained any certificate of public convenience and necessity for the construction or operation of its proposed extension.

Petitioner contended before the Circuit Court of Appeals and here contends that upon these facts it manifestly had at the date of the commencement of the injunction action and thenceforth to the date of entry of the final decree therein, an ever present interest in maintaining the *status quo* as against any railroad construction by another railroad carrier into its proposed territory in violation of said Paragraphs (18) and (20), pending final determination of its own application with regard thereto, sufficient to make it a "party in interest" within the meaning of said Paragraph (20)..

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI HEREBY PETITIONED FOR.

1. The Circuit Court of Appeals of the Ninth Circuit has by its decision in this action decided an important question of federal law in a way probably in conflict with applicable decisions of this Court, viz., *whether a plaintiff suing as a "party in interest" under said Paragraph (20) solely to enjoin a railroad extension in violation of said Paragraphs (18) and (20) must be possessed of an independent legal right of his own which will be invaded by the threatened construction, which is a requisite to the maintenance by a plaintiff in his own right of the ordinary equitable action for an injunction.*

We submit that the opinion of the Circuit Court of Appeals answers this question in the affirmative.

We contend that there is no decision of this Court sustaining such conclusion, and that the same is in conflict with the decision of this Court in *Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company* (referred to hereinafter and in the supporting brief as the *Texas & Pacific* case), 270 U. S. 266, 70 L. ed. 578, wherein railroad construction without a certificate was enjoined pursuant to Paragraph (20) at the instance of a plaintiff who had no independent legal right of its own to protect and would not suffer any legal injury by reason of the threatened Santa Fe construction, the only injury threatened to plaintiff being a possible diversion of traffic by a competitor by means of the proposed unauthorized and therefore unlawful construction; and also in conflict with the decisions of this Court

in such cases as *Alexander Sprunt & Son, Inc., et al. v. United States,* 281 U. S. 249, 74 L. ed. 832, and *Edward Hines Yellow Pine Trustees, et al. v. United States,* 263 U. S. 143, 68 L. ed. 216.

2. The Circuit Court of Appeals, by its decision that petitioner is not a "party in interest" (with relation to the proposed construction of respondent), within the meaning of said Paragraph (20), has decided an important question of federal law in a way probably in conflict with applicable decisions of this Court, such not only as the *Texas & Pacific* case, supra, but also such cases as *Alexander Sprunt & Son, Inc. et al. v. United States,* supra, and *Edward Hines Yellow Pine Trustees, et al. v. United States,* supra, as well as in conflict with the purposes of Congress in including "any party in interest" among those who may maintain the action authorized by said Paragraph (20).

3. If this Court does not agree with this petitioner's position that the decisions of this Court specified in 1 and 2 above are applicable to petitioner's situation under the facts of this case, the Circuit Court of Appeals by its decision herein has decided an important question of federal law without precedent, which has not been but should in the public interest be settled by this Court.

4. The decision of the Circuit Court of Appeals as to the construction to be given to the term "any party in interest" as used in said Paragraph (20) would render ineffective for any purpose whatever the provision in said paragraph for the maintenance by "any party in interest" of an injunction suit to prevent

such railroad construction as is expressly prohibited by said Paragraphs (18) and (20).

We respectfully submit that petitioner's reasons for the allowance of the writ of certiorari hereby sought require the issuance of such writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 6226, Southern Pacific Company, a corporation, Appellant, vs. Western Pacific California Railroad Company, a corporation, Appellee; and that the judgment of said Circuit Court of Appeals therein be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
April 15, 1931.

Respectfully submitted,
F. M. ANGELLOTTI,
H. P. TYLER,
Attorneys for Petitioner.

In the Supreme Court
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OCTOBER TERM, 1930

No.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation),
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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

TABLE OF DATES.

July 10, 1928	Incorporation of Western Pacific California Railroad Company (R. 277, Ex. 17).
July 11, 1928	Resolution adopted by Directors of Western Pacific California Railroad Company directing application to Interstate Commerce Commission for authorization to construct line of railroad from San Francisco to Redwood City, San Mateo County, California (R. 36).
July 16, 1928	Petitioner's application filed with Interstate Commerce Commission (R. 85).
January, 1929	First hearing on application, San Francisco, participated in by Southern Pacific Company, intervener, as a party in interest (R. 39).
March 23, 1929	Commencement of construction of extension by Southern Pacific Company (R. 40).
March 27, 1929	This suit begun (Bill for Injunction).
March 27, 1929	Order to show cause and temporary restraining order granted.
April 5, 1929	Amended complaint for Injunction filed (R. 1-12).
April 26, 1929	Temporary Injunction granted (R. 30-32).
April 26, 1929	Wm. H. Hunt, Esq. appointed Special Master to take testimony and make report (R. 31, 32).
December 28, 1929	Final report and findings of Special Master filed (R. 45).
January 31, 1930	Confirmation by Judge of District Court of Special Master's report and findings in favor of plaintiff (R. 58).
February 28, 1930	Final decree filed (R. 61-75).
February 9, 1931	Judgment of Circuit Court of Appeals reversing judgment of District Court (R. 323).
March 16, 1931	Order denying rehearing (R. 323, 324).

II.

OPINIONS AND JUDGMENTS OF THE COURTS BELOW.

The judgment of the trial Court was entered February 28, 1930 (R. 61-75).

The opinion of the Circuit Court of Appeals herein was rendered and filed on February 9, 1931. It is contained in the Transcript of Record herein at pages 316 to 322, inclusive, and is also appended to this supporting brief. It is published in the Advance Sheets, Vol. 46 (2d), Federal Reporter, pages 729 to 731, inclusive.

Judgment of the Appellate Court (Circuit Court of Appeals) was entered February 9, 1931 (R. 323).

Petitioner's petition to the Circuit Court of Appeals for a rehearing was denied March 16, 1931 (R. 323-324).

III.

JURISDICTION.

This case involves the interpretation and application of Paragraphs (18), (19), (20) and (22) of Section 1 of the Interstate Commerce Act (49 U. S. C. A., Section 1, Paragraphs (18), (19), (20), (22)).

The jurisdiction of this Court herein is conferred by Judicial Code, Section 240, Subdivision (a) (28 U. S. C. A., Section 347, Subdivision (a)).

IV.

STATEMENT OF THE CASE.

The material facts concerning this controversy are contained in the Statement of Matter Involved in the accompanying petition (supra, pp. 2 to 8).

V.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding, in effect, that a plaintiff suing as a "party in interest" under said Paragraph (20) solely to enjoin railroad construction in violation of Paragraphs (18) and (20) of the Interstate Commerce Act must be possessed of an independent legal right of his own which will be invaded by the threatened construction.

2. The Circuit Court of Appeals erred in holding that petitioner here was not a "party in interest," within the meaning of said Paragraph (20), as to the proposed unlawful construction by respondent.

VI.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved in this action are Paragraphs (18), (19), (20), and (22), of Section 1 of the Interstate Commerce Act (see U. S. Code, Ann., Title 49, Section 1, Paragraphs (18), (19), (20), and (22)), contained in the Transportation Act of 1920. These paragraphs are as follows, viz.:

Paragraph (18). "After ninety days after this paragraph takes effect *no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof,* or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, *unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation, of such additional or extended line of railroad,* and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment" (emphasis ours).

Paragraph (19). "The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the Governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall

also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates."

Paragraph (20). "The commission shall have power to issue such certificate as prayed for or to refuse to issue it, or to issue it for a portion or portions of a line of railroad or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. *From and after issuance of such certificate, and not before, the carrier by railroad may,* without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and *proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of Paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest;* and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of Paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both" (emphasis ours).

Paragraph (22). "The authority of the Commission conferred by Paragraphs (18) to (21) both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

VII.

ARGUMENT.

1. DETERMINATION OF THE QUESTION WHETHER A PLAINTIFF SUING UNDER PARAGRAPH (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT TO ENJOIN RAILROAD CONSTRUCTION IN VIOLATION OF PARAGRAPHS (18) AND (20) OF SAID SECTION 1 IS A "PARTY IN INTEREST" WITHIN THE MEANING OF SAID PARAGRAPH (20) IS IN NO WAY DEPENDENT ON HIS BEING POSSESSED OF SOME INDEPENDENT LEGAL RIGHT OF HIS OWN WHICH WILL BE INVADED BY THE THREATENED CONSTRUCTION.

(a) Decision of Circuit Court Herein is Based Solely on Ground that Plaintiff Did Not Possess Requisite to Maintenance of Ordinary Injunction Action, Thereby Ignoring Intent of Congress in Enacting Paragraphs (18) to (20) Inclusive of Section 1 of Interstate Commerce Act.

The opinion of the Circuit Court of Appeals which reversed the decision of the District Court on one ground only, viz., that plaintiff (petitioner here) was not a "party in interest" within the meaning of Paragraph (20), on its face discloses that the only reason for such decision was that the plaintiff did not possess an independent legal right of its own which would be invaded by the proposed construction.

The authorities cited and quoted from by the Court in support of its conclusion that "under these authorities and many others that might be cited it was error to grant a permanent injunction on the facts before the Court" (Opinion, Appendix and R. 321), were authorities citing and following the well established equitable principle admittedly applicable in the ordinary injunction suit brought by a plaintiff in his own right to protect against threatened injury, requiring that such plaintiff, in order to institute and maintain such action for equitable injunctive relief, have some existing independent legal right of his own the invasion of which is threatened by the act sought to be enjoined. Petitioner does not dispute the correctness of the principles stated in the decisions cited by the Court as applied to the actions concerned therein (ordinary equitable injunction suits) but contends that such decisions and the principles enunciated have no application whatever to the statutory injunction action afforded by said Paragraph (20), and that such cases cannot in any degree assist in interpreting and applying the term "any party in interest" as used in said paragraph. In such a statutory suit the question is simply whether a plaintiff therein is a "party in interest" with relation to the construction proposed to be enjoined, construing Paragraph (20) in connection with Paragraphs (18) to (22) inclusive of Section 1 of the Interstate Commerce Act in the light of the legislative purpose in authorizing injunction to prevent violations of said provisions. We have set forth these statutes on pages 16, 17 and 18 of this brief. The purpose of Congress

in the enactment of these provisions in the year 1920 was stated by this Court in the *Texas & Pacific* case, supra, (270 U. S. 277-279). As was said in said decision by this Court:

> "A truer guide to the meaning of the terms extension and industrial track as used in Paragraphs 18 to 22 is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. * * * (Citing cases)."

It was in pursuance of this purpose that the prohibition of railway extensions without authorization from the Interstate Commerce Commission was enacted.

We find in said Paragraph (18) an absolute prohibition of any extension by any carrier of its line of railroad unless and until authorization of the Interstate Commerce Commission shall first have been obtained therefor, evidenced by a certificate of public

convenience and necessity. This prohibition is repeated in Paragraph (20) where it is provided that,

> "from and after issuance of such certificate, and not before, the carrier by railroad * * * may proceed with the construction * * * covered thereby."

All that follows in said Paragraph (20) has to do with the matter of enforcing compliance by railroad carriers with the provisions of Paragraph (18) and of the sentence just above quoted from Paragraph (20), and the enforcement methods adopted were, *first,* authorizing the maintenance of statutory injunction suit for the purpose of preventing construction in violation thereof, and, *second,* declaring construction by any carrier in violation thereof a crime punishable by severe penalties.

(b) Statutory Injunction Under Paragraph (20), Solely to Prohibit Railroad Construction in Violation Thereof, Has Nothing in Common With Ordinary Equitable Injunction Action by Party to Protect a Threatened Independent Legal Right of His Own.

It is to be noted that the injunction to be obtained under said Paragraph (20) at the suit of the United States, the Interstate Commerce Commission, an appropriate state commission, or "any party in interest," *is effective only to prohibit railroad construction "contrary to the provisions of" these statutes;* in other words, such an injunction merely prohibits acts violative of a federal law. It does not purport to protect any right of the party plaintiff, whether that plaintiff be the United States, a governmental commission or board, or a "party in interest," all of

which are by the terms of said Paragraph (20) placed in the same category with regard to the right to maintain such a suit. Whatever benefit a "party in interest" plaintiff may obtain thereunder is solely such benefit as will incidentally result from the defendant being prevented by injunction from violating this law. The primary purpose of the injunction provision was to enforce compliance by carriers with the requirements of said Paragraphs (18) and (20). In the instant case the injunction granted was one merely enjoining the extension by respondent of its line of railroad as proposed, *"unless and until there has first been obtained from the Interstate Commerce Commission the necessary certificate of public convenience and necessity therefor,"* and if and when respondent obtains such a certificate the injunction will no longer be effective for any purpose. It seems clear that a proceeding for an injunction of this character has nothing in common with the ordinary injunction proceeding wherein a party seeks protection of some independent legal right of his own, and the well settled rules as to the qualifications requisite to the institution and maintenance of the latter proceeding are, we submit, entirely foreign to the question here involved.

(c) Conclusion that Statutory Authorization Under Paragraph (20) to "Party in Interest" to Enjoin Unlawful Construction is Available Only to Party Having Independent Legal Right of His Own, Would Render Such Statutory Authorization to a Party in Interest Unnecessary and Pure Surplusage, and Violate Well Settled Rules of Statutory Construction; and is in Conflict With This Court's Applicable Decision in the Texas & Pacific Case, and Inconsistent With This Court's Decisions in the Chicago Junction and Sprunt Cases, etc.

It is further to be noted that the term "any party in interest" as used in said Paragraph (20) cannot reasonably be held to denote only such a party as has an independent legal right of his own which will be invaded by the proposed unlawful construction. Such a one, under well settled legal principles, could initiate and maintain his action in his own right *without any statutory authorization whatever,* for the relief essential to the protection of such right, by way of injunction or otherwise. To give so limited a construction to Paragraph (20) as to hold, as we submit the Circuit Court of Appeals did, that it was designed solely to give protection to rights already fully protected by substantive law, would violate well settled rules of statutory construction. Illustration of the situation with regard to parties having independent legal rights of their own is to be found in the case of *Baltimore & Ohio R. R. Co., et al. v. United States,* 264 U. S. 258, 68 L. ed. 667, familiarly known as the *"Chicago Junction Case,"* in which the plaintiff carriers were seeking a decree vacating an order of the Interstate Commerce Commission made under Paragraph (2) of Section 5 of the Interstate Commerce Act, authorizing acquisition by the New York Central of certain Chicago terminal railways. *There was no*

statutory authorization available to the plaintiffs for the maintenance of their action. This Court, however, holding that the loss threatened was "not the incident of more effective competition" but was "injury inflicted by denying to the plaintiffs equality of treatment" (68 L. ed. 675), a right to which they were entitled under the law (idem), held the plaintiffs entitled to maintain their action, notwithstanding absence of statutory authorization, for the reason, as stated in its subsequent decision in *Alexander Sprunt & Son, Inc. v. United States*, 281 U. S. 249, 74 L. ed. 832, 838, "that an independent legal right of the plaintiff was affected by the order which it was sought to set aside." There was some difference of opinion between the members of this Court in the *Chicago Junction* case as to whether or not any independent legal right of the plaintiffs was actually involved, but there was no disagreement with regard to the acknowledged right of one having such an independent legal right to maintain his action for all necessary protection thereof without any statutory authorization therefor. In the instant case we have an express statutory authorization for the maintenance of the injunction suit by "any party in interest," which is wholly unnecessary and pure surplusage if the views expressed by the Circuit Court of Appeals in this case as to the meaning of the term "any party in interest" are correct. It must be presumed that Congress, in inserting this provision for an injunction suit by "any party in interest," had in mind other parties than those already afforded full protection by substantive law.

If it be essential to the maintenance by "any party in interest" of the injunction suit authorized by said Paragraph (20) that such party be possessed of an independent legal right of his own which will be invaded by the threatened action of the defendant, as, we submit, is declared by the opinion of the Circuit Court of Appeals in this case and constitutes the sole basis of its decision, it necessarily follows that the plaintiff in the *Texas & Pacific* case, supra, was not qualified to maintain that action for the reason that it had no independent legal right of its own, invasion of which was threatened by the proposed extension of the defendant. The opinion of this Court therein shows that the only injury threatened by the proposed extension of the Santa Fe into its territory was the coming in of a competitor for traffic and the probable loss of business by reason of the presence of such a competitor.

(d) Threatened Loss of a Competitive Advantage is Not, as to the Party Threatened With Loss, a Legal Actionable Wrong, But Constitutes the Invaded Party a "Party in Interest" Within Paragraph (20) and the Only Remedy for the Invaded Party is Afforded by Paragraph (20), Which Remedy is Both Affirmative and Complete Under Applicable Decisions of This Court.

It was fully recognized by the opinion of this Court in *Baltimore & Ohio R. R. Co., et al. v. The United States,* supra, that loss of traffic by a railroad carrier due to competition was not such an injury to such carrier as would be violative of any of such carrier's independent legal rights (supra page 24). It is obvious, we think, that no railroad carrier can be held to have, as against a possible competitor, any legal

right or title to the traffic of any of the territory served by it. Prior to the enactment of Paragraphs (18) to (22) of Section 1 of the Interstate Commerce Act, railroad carriers were at liberty to construct extensions wherever they saw fit, utterly regardless of whether they thereby occupied territory already served by other carriers, with consequent loss of traffic to such other carriers when they did thus establish themselves in territory served by such other carriers. In such cases the carrier whose territory was invaded was as absolutely without protection as is the grocery store keeper whose field of operations is invaded by another grocery store keeper establishing a store in the same neighborhood, for the reason that such a carrier had nothing *in the nature of a legal right* as against a possible competitor for the traffic of the territory served by it, nothing upon which an application in its own right for an injunction to prevent competition could be founded. As we have seen, one of the principal objects of said Paragraphs (18) to (22) was, in the interest of the public as a whole in maintaining an adequate railroad system throughout the United States, to prevent such a weakening of a railroad already serving particular territory, except upon a finding by the Interstate Commerce Commission that considerations of public convenience and necessity require the new line, made upon due application and investigation, and after a hearing at which all interested parties may appear.

That a railroad carrier has nothing in the nature of a legal right as against an existing or possible competitor for the traffic of the territory served by it, has

been recently expressly held by a "three judge court" in *Pennsylvania R. Co. v. United States,* 40 F. (2d) 921, 924, 925, a decision as to which certiorari was not applied for by the Pennsylvania Railroad Company. That company was attempting to maintain an action to vacate an order of the Interstate Commerce Commission authorizing another railroad carrier to extend its line into territory then exclusively served by the Pennsylvania. The only threatened injury to the Pennsylvania by reason of the proposed construction of the new company was the *loss of traffic* that would, in all probability, be suffered by the coming in of this competitor for such traffic. The Court held that while the Pennsylvania "undoubtedly had such an interest in the application for the extension as entitled it to intervene and be heard" in the proceeding before the Commission, "such interest alone did not give it a right to maintain an independent suit *to set aside the Commission's order," for the reason that no legal right of its own was violated by the order.* There was no statutory authorization for the institution of such an independent suit by a "party in interest." In the absence of statutory authorization for such suit by a "party in interest" to annul an order of the Interstate Commerce Commission, it was incumbent upon the Pennsylvania to show that the order assailed violated some legal right of its own. As to the want of legal right in the Pennsylvania, the Court said:

> "True the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the

traffic flowing into and out of that busy district. *But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted unless it be found somewhere in the law, written or unwritten.* Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law, the Transportation Act of 1920, does not explicitly or implicity accord a noncompetitive traffic area to the first taker as the law accords a trade-mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service * * *. *Where, as here, the showing is lawfully made and the Commission has validly acted, the carrier at whose expense the change is wrought has no legal right invaded and has suffered no legal injury"* (emphasis ours).

We respectfully submit that the correctness of these views cannot be disputed.

In the *Texas & Pacific* case, supra, the situation of plaintiff was precisely that of the Pennsylvania in the case just above discussed; it clearly had no present *legal right of its own* to protect and the coming in of the Santa Fe as a competitor for its business *could inflict no legal injury upon it.* Since the only injury threatened plaintiff therein by the proposed extension of the Santa Fe was the coming in of a competitor and the probable loss of business by reason of the presence of such competitor, it is quite clear that the

Texas & Pacific Railway Company could not have successfully maintained its action against the Gulf, Colorado & Santa Fe Railway Company except for the express statutory authorization given by Paragraph (20) to any "party in interest." We respectfully submit that the application to the plaintiff in the *Texas & Pacific* case of the test prescribed by the opinion herein, would have precluded the granting of the injunction sought and obtained by the Texas & Pacific Railway Company.

While opposing counsel in the *Texas & Pacific* case, although ably and ingeniously raising numerous objections to the action and the relief sought, apparently did not object to the institution and maintenance of the suit on the ground that the plaintiff therein was not a "party in interest" within the meaning of Paragraph (20) (presumably recognizing the clear statutory right of the plaintiff to maintain the same), jurisdiction of the action was entertained by this Court and the facts material to the institution and maintenance of the action were before this Court and actually set forth in the opinion therein. Under these circumstances, this Court, replying to an objection that the plaintiff had not first sought relief at the hands of the Interstate Commerce Commission, said of the plaintiff therein:

> "But a party in interest who is opposed to the construction is not authorized by the act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear therein in opposition. *If no such application has been made*

Paragraph (20) affords him the only remedy. That remedy is both affimative and complete." The *Texas & Pacific* case, supra (at page 273, 270 U. S. Reports), (emphasis ours).

In other words, that remedy gives such a carrier all that it is entitled to under the law, viz., the prevention of any extension by a competing railroad that may prejudicially affect it, until, upon due application and hearing, at which it may appear and be heard in opposition, the Interstate Commerce Commission has granted the requisite certificate of public convenience and necessity. It is very clear that the views expressed in the opinion of the Circuit Court of Appeals herein eliminate from the category of "any party in interest," as that term is used in said Paragraph (20), any railroad carrier in the situation of the Texas & Pacific at the time it instituted and maintained to final decree the injunction proceeding involved in the *Texas & Pacific* case, supra, and any such carrier would be without any remedy whatever as against an extension undertaken by a competing carrier into its territory, with no opportunity afforded it to have the question of the propriety of such extension determined by the Interstate Commerce Commission in the light of such objections as it might make thereto on the ground of want of public necessity therefor.

The term "any party in interest" as used in legislation relative to the Interstate Commerce Commission was involved in *Alexander Sprunt & Son, Inc., et al. v. United States*, 281 U. S. 249, 74 L. ed. 832, and *Edward Hines Yellow Pine Trustees, et al. v. United*

States, et al., 263 U. S. 143, 68 L. ed. 216. Each of these cases was an action brought by shippers to annul an order of the Interstate Commerce Commission.

In the *Sprunt* case the shippers were deprived by the Commission's order "of a competitive advantage" but "were not subjected to or threatened with any legal wrong." There was no statutory authorization *for the institution of any suit by a party in interest to vacate such an order.* It was held by this Court with regard to these parties that by reason of their competitive advantage under the old rate they had "a distinct interest in the proceeding before the Commission." This Court therein said (281 U. S. 249, 254, 255):

> "The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under paragraph 3 of the Interstate Commerce Act. For their competitive advantage was threatened. Having this interest they were entitled to intervene in that administrative proceeding. And if they did so they became entitled under paragraph 212 of the Judicial Code to intervene as of right in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order."

It is plain from what is said that if there had been a statute authorizing suit by "any party in interest," as there is in Paragraph (20), this Court would have

held that these shippers, as such parties in interest, were entitled to institute and maintain such suit to annul the order assailed. The importance of this decision in the instant case is not only because the meaning given therein by this Court to the term "any party in interest" as used by Congress in an analogous statute (Section 212, Judicial Code, now Sections 44 and 45 (a) of Title 28, U. S. C. A., Supplement 1929 thereto) was with regard to proceedings before the Interstate Commerce Commission, referred to in the above quotation, where the term used was "and any party or parties in interest to the proceeding before the Commission," but also because such meaning is utterly opposed to the meaning attributed to the term by the Circuit Court of Appeals herein.

In the *Sprunt* case the Court said (U. S. Rep. 143, 147 and 148):

> "Appellants' present position resembles in all essentials one which was put forward in *Edward Hines Yellow Pine Trustees v. United States*, 263 U. S. 143, 147, 148."

We respectfully submit that the views expressed by the Circuit Court of Appeals in its opinion herein are at variance with the views expressed by this Court in its decision in these two cases.

It would seem that the true meaning of the term "any party in interest" contained in said Paragraph (20) is a matter of great public importance, and that the views of the Circuit Court of Appeals with regard thereto, as stated in its opinion, are of such a nature that they should not be allowed to become the estab-

lished law in the United States or in any circuit thereof without full consideration and decision to that effect by this Court. We respectfully submit that the views of the Circuit Court of Appeals with regard thereto, to the effect that such a "party in interest" must have some independent legal right of his own which will be invaded by the threatened extension, cannot be sustained.

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2. THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER HERE WAS NOT A "PARTY IN INTEREST" WITHIN THE MEANING OF SAID PARAGRAPH (20) WITH RELATION TO THE PROPOSED UNAUTHORIZED EXTENSION OF RESPONDENT.

(a) Carrier Plaintiff Represents Public as Well as Private Interests.

Incidentally involved here, though not substantially material, we believe, to a determination of this question, is the question whether petitioner suing under Paragraph (20) represents the public as well as private interests. This question was presented to this Court in the *Texas & Pacific* case, supra, wherein the District Court had overruled a plea of laches interposed by the defendant as not supported in fact, and also "on the ground that a plaintiff suing under Paragraph (20) represents the public as well as private interests, and that, hence, a plaintiff's laches cannot operate as a bar." This Court said:

> "We need not determine whether the latter ground is sound; for the facts do not warrant a finding of laches" (*Texas & Pacific* case, supra, 70 L. ed. 584).

We have found no other decision of this Court in which this particular question is referred to, and while, as said above, we do not deem its determination substantially material to our claim that petitioner was a "party in interest" within the meaning of Paragraph (20), it is a question that might well be of substantial importance in any proceeding instituted by one as a "party in interest" under Paragraph (20) to enjoin a prohibited extension, and, we respectfully submit, should be determined by this Honorable Court.

With regard to this question we have, at this time, simply to suggest one or two considerations with regard to the purpose of the injunction provision in that paragraph, the character of the action and the relief to be obtained thereunder.

We submit that it is clear that the primary purpose of Congress in enacting the injunction provision was to insure compliance by carriers with the requirements of said Paragraphs (18) and (20), by providing a method by which they could be enjoined from violating the provisions contained therein. Congress in enacting this provision can hardly be assumed to have been primarily concerned with the matter of protection of private parties. In Paragraph (20) the "party in interest" is grouped with other possible parties, in each case a public body, whose exclusive purpose in bringing any such proceeding would necessarily be the protection of public interests, and the relief that could be obtained at the suit of a "party in interest" is exactly the same as that to be obtained

by the United States or by any governmental tribunal specified therein, viz., enforced compliance with the law as specified in Paragraphs (18) and (20). It would seem that under such circumstances the plaintiff "party in interest," whatever may be his private interest, necessarily represents public interests, as well as his own private interests. It may fairly be inferred that Congress, in including "any party in interest" among those designated as parties plaintiff for such a suit, felt that such a party would have a special interest in seeking to prevent a threatened violation of law which might prejudicially affect it, and that, by reason thereof, whenever its interest seemed to it to justify such action, it would institute and maintain such suit to prevent the threatened violation of law. It may well have been recognized that such a party would be more alert in seeking to prevent any particular unlawful construction thought to be prejudicial to its own interests than would the United States or any commission, and that by enabling such a party to maintain an injunction proceeding against a violator of the law, enforcement of the law would be facilitated.

It is hardly necessary to point out the importance of the party in interest to the plan of Congress to effectuate compliance by carriers with the provisions of said Paragraphs (18) and (20), designed, as was said by this Court in the recent case of *Chesapeake & Ohio Ry. Co. v. United States, et al.*, 75 L. ed., Advance Sheets 445, "in the interest of the public, to prevent improvident and unnecessary expenditures

for the construction and operation of lines not needed to insure adequate service."

On the ground, with opportunity to know of any proposed violation disadvantageous to him and naturally disposed to immediately take all steps necessary to adequately protect his interests, he is perforce an additional guardian of the public interests in seeing that any construction in violation of law is stopped. The Interstate Commerce Commission with its manifold nation-wide duties, however efficient and zealous it may be, cannot police the whole country. And there is no special interest to spur any State Body to action in such cases.

We believe we do not exaggerate when we say that the "party in interest" is the most important cog in the machinery provided by Congress in so far as the injunctive remedy is concerned. By limiting the term "any party in interest" in the way the learned Circuit Court of Appeals has done, we submit that, for all practical purposes, such party has been entirely eliminated, and substantially the whole purpose of his express inclusion as a proper party plaintiff by Congress has been frustrated.

(b) Situation of Petitioner Under Circumstances of This Case Made it an Interested Party as to Respondent's Unauthorized Construction.

The words "any party in interest," are words of broad scope, and taken simply as they read would clearly include any one who has any "interest" having relation to the threatened action sought to be enjoined. There is nothing in the connection in which

they are here used to limit such meaning. In fact, considering the purpose of the enactment of these provisions of law (said Paragraphs (18), (19), 20)) such meaning is emphasized rather than limited. Congress was obviously seeking assurance of the enforcement of the prohibitions contained in those paragraphs. These considerations compel a construction of the term which would include all who, *by reason of their then situation, have a real and legitimate concern in the threatened violation of law, and may be disadvantaged by such violation.* It is to be noted that the statute does not attempt to measure the extent, amount or character of the interest required in a plaintiff. It is enough that the party has an "interest" having relation to the threatened extension sought to be enjoined.

The opinion of this Court in *Alexander Sprunt & Sons, Inc. v. United States,* supra, appears to give full support to these views.

We respectfully submit that under the views expressed in that case, petitioner was a "party in interest" with relation to the proposed construction by respondent. If we divorce ourselves from the idea that the term "any party in interest" as used in said Paragraph (20), denotes solely a party having some independent legal right of his own which is being invaded, as we submit we must do in view of the considerations to which we have referred, this would seem clear. We have in our petition at pages 5 to 8 inclusive set forth the material facts in this respect. Briefly, the picture presented thereby is as follows:

Seeking to enter new territory not in fact served by any railroad carrier, petitioner proceeds in a lawful manner to make application to acquire the essential authorization from the Interstate Commerce Commission. Opposed by respondent, the contest is a protracted one. While such contest is pending, respondent, still opposing petitioner's application and without filing any application for a certificate authorizing extension of its own railroad into such territory, proceeds to actually construct an extension of its own railroad into such territory. Manifestly the presence of another railroad in such territory will be of great disadvantage to petitioner in the matter of traffic, if it constructs its own railroad therein. Manifestly, too, if respondent had applied to the Interstate Commerce Commission for the necessary certificate, petitioner, because of its own pending application, would have been entitled to intervene in respondent's proceeding as a "party in interest" therein, and in the two pending proceedings (petitioner's and respondent's) it would have been determined by the Commission what "the present or future public convenience and necessity" required in the matter of railroad construction in that territory, i. e., whether one or the other or both of these carriers should construct their respective lines of railroad into such territory. There is no way by which that question can be determined by the Commission except upon an application by respondent for the necessary certificate (*Texas & Pacific* case, supra, 70 L. ed. 582), and respondent here failed to make any such application and has proceeded with actual construction in violation of the statute

expressly prohibiting such action, thus attempting to avoid determination of the question whether its extension is, under the circumstances, warranted by considerations of public convenience and necessity, a matter in which petitioner is, by reason of its own pending application, vitally concerned.

Does it not seem clear that, in such a situation, petitioner had a present "interest" in maintaining the *status quo* as against any unlawful extension by another carrier into its proposed territory, pending determination of its own application with regard thereto, and that it was therefore, at the commencement of its suit, and thenceforth to final decree, a "party in interest" with relation to such proposed extension, within the meaning of said Paragraph (20)? It is obvious that in the absence of this injunctive remedy, petitioner would have found upon the granting of its application, that the territory to be traversed by its own line was already occupied by an extension of the railroad of its principal competitor for business, which would very materially alter the situation existing at the time of the institution of its own proceeding for the necessary certificate of public convenience and necessity.

In this connection, attention is respectfully called to the memorandum opinion of the trial judge in granting the temporary injunction herein, which is contained in the record (pp. 32 to 35) in which the interest of petitioner with regard to the proposed extension of respondent is concisely set forth.

The fact that at the time of the initiation of this suit and thenceforth to the time of final decree in the

District Court, it was possible that petitioner's application for a certificate of public convenience and necessity might be finally denied, cannot detract from petitioner's interest. By duly making its application to the appropriate lawful tribunal for a certificate it put itself into a position under the law where it had the right to oppose, by all lawful means, the entry of another carrier into the territory proposed to be served by it. That it could intervene in opposition, in any proceeding before the Commission initiated by another carrier for authorization to extend its line into such territory cannot be doubted. It would seem that it certainly had such an interest in fact with relation to any extension of another carrier's line into the same territory as to warrant its being classed as a "party in interest" with regard thereto, with full capacity as such under said Paragraph (20) to institute and maintain this action, brought solely to enjoin construction by respondent of an *unlawful extension* to serve the same territory. Notwithstanding the granting of petitioner's application by the Commission while defendant's appeal to the Circuit Court herein was under submission and not yet decided, thus removing the last obstacle to construction by applicant of its proposed line, the necessity of the continuance in force of the injunction granted by the final decree herein prohibiting construction by defendant into the territory proposed to be served by petitioner, without an adjudication by the Interstate Commerce Commission that public convenience and necessity justified such extension, is at least as great as it was prior to the receipt by petitioner of its certificate from the Commission.

3. RESPONDENT'S PROPOSED CONSTRUCTION WOULD HAVE CONSTITUTED AN EXTENSION OF ITS LINE OF RAILROAD WITHIN THE MEANING OF SAID PARAGRAPH (18).

In so far as our petition for a writ of certiorari is concerned, we refer to this matter here simply for the purpose of stating that the findings of the Special Master with regard thereto, confirmed and adopted by the trial judge, were in petitioner's favor in all respects; and that upon the particular question whether respondent's new trackage would constitute a "spur" as distinguished from an extension, every point made by learned counsel for respondent is answered by what was said by this Court in its opinion in the *Texas & Pacific* case, supra, 270 U. S. 266.

CONCLUSION.

We believe the question decided by the opinion of the learned Circuit Court of Appeals herein to be of such general importance as to merit the consideration of this Honorable Court. The importance of the question from the national standpoint lies in the fact that if the term "any party in interest" contained in said Paragraph (20) be restricted to the extent required by the opinion of the Circuit Court of Appeals, it will seriously impair, if indeed it does not destroy, the intended efficacy of the injunctive remedy in favor of "any party in interest" provided by said Paragraph (20). This remedy was deemed essential by Congress to insure compliance with the provisions enacted by it in the matter of railroad extensions (said Paragraphs (18) and (20)), in further-

ance of its policy of developing and maintaining an adequate railway system for the people of the United States.

We respectfully submit that the case is one calling for the exercise by this Court of its supervisory powers, and to that end, a writ of certiorari should be granted as prayed.

Dated, San Francisco, California,
April 15, 1931.

Respectfully submitted,

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Attorneys for Petitioner.

A. S. HUTCHINSON,
On the Brief.

(Appendix Follows.)

Appendix

Opinion United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6226

Southern Pacific Company (a corporation), *Appellant,*

vs.

Western Pacific California Railroad Company (a corporation), *Appellee.*

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Before: Rudkin and Wilbur, Circuit JJ., and Norcross, District J.,

Per curiam:

July 10, 1928, the Western Pacific California Railroad Company was organized as a corporation under the laws of the State of California for the purpose, among others, of constructing and operating a standard gauge line of railroad commencing at a point in the City and County of San Francisco and extending thence in a general southerly direction to and beyond

Redwood City, in San Mateo County, California, the purpose of the construction being to enable the company to carry freight and other traffic for hire as a common carrier from and to points on the line of the proposed road between its termini. The Western Pacific Company applied to the Interstate commerce Commission for a certificate of necessity authorizing the construction of the road, as required by the Transportation Act of 1920 (49 U. S. C. A. Sec. 1, Par. 18), and that application was still pending at the time of the final hearing in the court below.

The Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and has for many years last past operated as owner, or lessee, a line of railroad extending from the City of San Francisco in a southerly direction to and beyond Redwood City, California. The latter company is also a common carrier organized for the purpose of transporting persons and property in interstate and intrastate commerce for hire. The existing line of the Southern Pacific parallels the proposed line of the Western Pacific throughout its entire length, the two lines being approximately one-half mile apart. On March 23, 1929, the Southern Pacific Company commenced the construction of a railroad track, or spur, across the proposed line of the Western Pacific at a point near the limits of the City of San Mateo. This proposed line is to be about 8200 feet in length and will extend from the main line in an easterly direction towards San Francisco Bay.

Paragraph 18 of Section 1, *supra,* provides that no carrier subject to the act shall undertake the exten-

sion of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under the act, over or by means of such additional line of railroad, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation, of such additional or extended line. Paragraph 20 of the same section provides that any construction or operation contrary to the provisions of Paragraph 18 may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest. Paragraph 22 of the same section provides that the authority conferred on the Commission by paragraph 18 shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The present suit was instituted by the Western Pacific Company against the Southern Pacific Company to enjoin the construction of the contemplated track by the Southern Pacific on the ground that the latter company had not obtained a certificate of necessity from the Interstate Commerce Commission, as required by paragraph 18, *supra*. From a final decree granting a permanent injunction, the Southern Pacific

Company has appealed. Two questions are presented for consideration. First, is the Western Pacific Company a party in interest within the meaning of paragraph 20, and second, is the 8200-ft. track contemplated by the appellant an extension within the meaning of paragraph 18, or is it a spur or industrial track within the meaning of paragraph 22?

As appears from the foregoing statement, the appellee has been organized as a corporation, has projected a line of railroad and has applied to the Interstate Commerce Commission for a certificate of necessity. On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant from building a spur track, or extending its line, as the case may be. Such showing will not, in our opinion, support or justify an injunction such as was granted here.

> "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending, and threatened so as to be averted only by the protecting preventive process of injunction." Truly v. Wanzer, 5 How, 140, 142.

> "The complainant must establish a clear legal right, not doubtful, nor uncertain, and the injury threatened must be of a permanent and irrepara-

ble character. Where the complainant's title is doubtful, equity will not relieve by injunction. * * * It is the duty of the court when an injunction bill has been filed to inquire and ascertain whether the individual or corporation seeking the relief has a clear legal right to the use, occupation, or enjoyment of the property or right, the invasion of which is sought to be enjoined. These are elementary principles in a proceeding in equity. The complainant must rely on the strength of his own title, or other legal right, and not on the weakness of the title or legal right asserted by the respondent."

Again:

"The appellant is seeking equitable relief, and has the burden of establishing a clear legal title to the use and occupation of the streets and the possession of the rights of way in dispute. It has failed to show that it has any valid or existing ordinance giving it the right to the use of the streets in question, nor has it proven title to the disputed rights of way, and it necessarily follows that the clear legal right necessary to sustain this proceeding has not been established." Myersdale & S. St. Ry. Co. v. Pennsylvania & M. St. Ry. Co., 69 Atl. 92, 94, 95.

"An injunction will not issue to protect a right not in esse and which may never arise, or to restrain an act which does not give rise to a cause of action, or to prevent the perpetration of an act prohibited by statute in favor of one who urges as his only ground for relief the diminution of the profits of a trade or business pursued by complainant in common with others.

> "Where complainant's right is doubtful or his title is in dispute, a perpetual injunction cannot be obtained until the doubt is removed by a proper proceeding and the right made certain, the only proper relief which may be granted in such cases being a temporary injunction maintaining the status quo until the right or title in question is established. A permanent injunction should not be awarded except in a clear case and to prevent irreparable injury." 32 C. J. 35, 36.

Under these authorities and many others that might be cited, it was error to grant a permanent injunction on the facts before the Court. Had the application of the appellee for a certificate of necessity been finally denied by the Interstate Commerce Commission before the suit was instituted, or before final decree, the error would seem apparent, because in that event the appellant would have been restrained from constructing a spur track, or extending its line, at the suit of an utter stranger without the slightest interest in the pending controversy. Had the application been denied pending the appeal the error would seem equally apparent; and the fact that the application has since been granted, if such be the fact, does not change the nature of the appellee's right or title at the time the final decree was entered. For this error, the decree must be reversed.

In view of this conclusion, we deem it unnecessary, if not improper, to consider the doubtful and perplexing question whether the line contemplated by the appellant is a spur or industrial track, wholly within a state and within the exclusive jurisdiction

of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission.

Reversed and remanded.

(Endorsed): Opinion filed Feb. 9, 1931,

Paul P. O'Brien, Clerk.